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Alice Loos v. Mountain Fuel Supply Company and Utah Motor Park Incorporated : Reply Brief

Utah Supreme Court

Rich, Rich & Strong; Attorneys for Defendant; Utah Motor Park, Inc.;

Case No. 6211

In the Supreme Court
of the State of Utah

ALICE LOOS,
Plaintiff and Respondent,

vs.

MOUNTAIN FUEL SUPPLY COMPANY, a corporation, and UTAH MOTOR PARK, INCORPORATED, a corporation,
Defendants and Appellants.

Reply Brief of Appellant Utah Motor Park, Incorporated

RICH, RICH & STRONG,
Attorneys for Defendant, Utah Motor Park, Inc.

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Reply Brief of Appellant Utah Motor Park, Incorporated

There are two things which prompt this appellant to file a reply: First, that in some particulars respondent has forgotten the facts and issues; and second, that counsel for respondent seems to have imagined certain facts to have been established by the evidence in applying the law.

FACTS AND ISSUES.

On page two of respondent's brief is the following statement:

> "It is admitted by the respondent that the appellant Fuel Supply Company, hereinafter referred to as Gas Company, supplied natural gas to the Motor Park and the Motor Park to its furnished cottages, including that occupied by respondent at the time of the accident."

Counsel for respondent certainly had a lapse of memory when he made that statement out of thin air. Nowhere in either the allegations or the evidence is there an allegation or admission that the Motor Park furnished gas to its cottages.

Paragraph two of the amended complaint expressly alleges that the defendant *Gas Company* was supplying the gas to the defendant Motor Park and to the individual cottages by means of pipe laid underground from *its* source of supply and by means of connections leading from *its* system of pipes to the heating and cooking facilities in the apartments maintained by the Motor Park for use of the tenants of the Motor Park.

Paragraph three alleges that the Motor Park operates its apartments which were supplied with gas from the system of pipes from the defendant Mountain Fuel Supply Company. (Ab. 3-4)

These allegations were admitted by the defendant Motor Park (Ab. 14-15). The only evidence on the sub-

ject was given by the witness Lindholm, who testified (Ab. 66) to the effect that the Utah Motor Park had nothing to do with the regulation of the supply of gas to the Park. Aside from these allegations, admissions, and that one statement by Mr. Lindholm, the subject matter was never mentioned.

On page 11 is the following: "That the pipes and connections were not inspected by either defendant, but on the contrary the duty of reporting leaks was left to tenants, is established and is not in dispute."

Where counsel could have found a basis for that statement is certainly a mystery.

And on page 14, speaking of the Gas Company, counsel says: "But it also knew that the Motor Park made no inspection but merely reported it when the odor of gas became so offensive to tenants that they made complaint of it."

And again on page 23 is the following, speaking of the Motor Park: "Its manager testified in the case that when complaint was made of the odor of gas it made no investigation but called the Gas Company and left to it the duty of locating the leak and repairing it."

Undoubtedly we could safely rely upon this court to read the record and decide the case upon the *facts established by the evidence,* but in the face of such glaring misstatements we feel constrained to again call the court's attention to the evidence upon these subjects,

since they are all more or less related and refer to the same proposition.

Mr. Lindholm testified (Ab. 48-49) in answer to questions by *counsel for plaintiff*, that when an odor of gas was reported the Motor Park would in most instances make an investigation by going over to see if they could take care of it themselves, but if someone said there was a bad odor of gas they would call the Gas Company immediately. Again under cross-examination of *counsel for plaintiff* (Ab. 69-70-71) Mr. Lindholm was asked the question if there was anybody whose duty it was to investigate and find out what was wrong when gas was leaking, and he answered that he always sent Mr. Sheets, assistant manager, or investigated it himself, and that in fact all the employees had instructions if there were any leaks to make a report to the office, and we would check and find out, and if there were gas leaks the Motor Park reported to the Gas Company, "always called the Gas Company", and after the repairs were made the Motor Park always checked up to find out if it was repaired. The gas man didn't leave until it was repaired. He would require the Motor Park to sign a small slip showing that the repair had been made, and that the Motor Park, by Mr. Lindholm personally or by employees, always made an investigation to find out if the repairs were satisfactory, and also "in going through cottages he observed the odor of gas at times when it had not been reported". Reports of odor of gas were made more frequently than odors were found by investigation.

Tenants were shown the cottages by an employee of the Motor Park before they were rented, as was done with Mr. and Mrs. Loos. If there was anything wrong with the cottage, or if there was a gas odor in the cottage, it would be observed at the time. At that time the heating apparatus was tested and the tenant was shown how to operate it.

Mr. Sheets testified (Ab. 57) that when the odor of gas was reported the Park employees would go and see if there were a gas leak, and if there were they would notify the gas company, and (Ab. 58) that they were always on the lookout for anything as they worked around the court.

The Motor Park employed a housekeeper and maids (Ab. 61-63). It was the duty of the maids to see that the cottages were kept clean, and it was the duty of the housekeeper to see that everything was run correctly, to see that the maids did their work, and to take care of any complaints. So far as week to week tenants or monthly tenants were concerned, it was the maid's duty when people moved out to clean the cabins, make the beds, clean the floors and bathroom and the wash basin, and so far as Mr. and Mrs. Loos were concerned to go once a week to the Loos cottage to give them clean linen, and the head housekeeper was in the Loos cottage about two o'clock on the afternoon of the accident.

In addition the Motor Park utilized the services of the Gas Company to the very utmost in investigating and

checking for leaks and in seeing that they were repaired. The Gas Company hired experts in the matter of handling gas and detecting and repairing leaks. It was their business. As before stated, the Motor Park was a customer or consumer. It did not pretend to be an expert in the handling of gas any more than Mr. and Mrs. Loos or any other customer in Salt Lake City or elsewhere. It was only natural that it should go to the Gas Company for this class of service, and it had a right to assume that when the Gas Company reported that the repairs were made that such was the fact, and it had the right to assume that if there was anything wrong with the situation down there that the Gas Company would know it and see that it was corrected.

Counsel for plaintiff makes much of the fact that both Mr. Lindholm and Mr. Sheets testified that they relied upon tenants to make complaints of gas odors if there were any.

This was not, as stated by counsel for plaintiff, the exclusive source of information. It was, however, only natural that the tenants or occupants should be the main source of information. They were occupying the premises to the exclusion of the Motor Park. This was particularly true of month to month tenants and week to week tenants. Employees of the Motor Park had no more right to go into the cottages than an apartment house owner would have to go into the apartments of his tenants. The tenant was operating the appliances and occupying the premises to the exclusion of the Motor Park

employees. This was the most natural source for the Motor Park officials to look to for complaints.

Counsel for plaintiff states on page 11 "that there was not sufficient ventilation to prevent accumulation of gas in dangerous quantities may also be inferred from what happened there". Certainly it is evident that the gas which came into the cottage by a sudden gush at the time of the explosion could not escape. This is no evidence of the fact that the cottages were not properly and sufficiently ventilated for ordinary purposes. The Motor Park was bound to use only *ordinary care* and to provide for *ordinary events*. There was no duty upon the Motor Park to provide ventilation to take care of extraordinary events. Otherwise it would be impossible to either construct or maintain a house, residence, factory or other structure. All gas pipes are laid in the ground or within partition walls, in basements, or in conduits. If the owners of premises were required to provide sufficient ventilation at each spot in their premises to take care of a sudden gush of gas which might occur by reason of some unforeseen and unforseeable incident there could be no such thing as modern building. If the vents which were provided were insufficient to take care of ordinary events and to take care of any natural or probable leaks and to provide for the escape of fumes which in the ordinary and usual operation of premises might occur, then it seems to us that it would have been possible for plaintiff to provide that evidence through the calling of any builder or heating engineer.

Throughout respondent's brief it is assumed that there is evidence in the case to the effect that this explosion occurred in a portion of the premises under the exclusive control of defendant Motor Park. It is also assumed throughout the brief that there is evidence in the case to the effect that the pipes and connections within or beneath the Loos cottage were leaking prior to the time of the accident and that the explosion occurred by reason of a leak beneath the Loos cottage. There is no such evidence and such assumptions are in error. We shall discuss this in connection with the particular points involved.

POINT I.

WAS THERE ANY EVIDENCE SUFFICIENT TO TAKE THE CASE TO THE JURY AS AGAINST DEFENDANT MOTOR PARK?

It will be observed:

1. That plaintiff does not pretend to have presented any evidence of the structural defect alleged in paragraphs 4, 5, and 6 of the amended complaint.

2. That plaintiff failed to establish by any evidence the allegation that defendant Motor Park failed to make inspection of its premises, but on the contrary the uncontradicted evidence shows that it was vigilant and made frequent and continuous inspections, and this notwithstanding the fact that this court in the case of *Hatsis v. United States Fuel Company,* 82 Utah 38, held that there is no liability upon a landlord for failure to inspect

and discover hidden dangers, and that there is no duty on the landlord to discover and apprise the tenant of hidden or unknown defects, if any.

3. Plaintiff failed to produce any evidence to the effect that the ventilation provided beneath the cottage was insufficient.

Counsel for respondent seems to feel, however, that this lack of evidence is cured and the deficient evidence supplied because defendants objected to the cross-examination of Mr. Lindholm as to the cause of the accident and because the court refused to compel Mr. Slusser of the Public Service Commission to testify, and because counsel assumes that defendants had information in their possession as to the cause of the explosion, which they failed to produce.

As to the witness Lindholm, respondent called him as a witness as part of respondent's case, and examined him at length upon the issues of the case (Ab. 43-50). Mr. Lindholm was not asked one question at that time as to the cause of the explosion, the construction of the cottage, or what, if any, structural defects there were within the cottages as alleged in the complaint. Counsel for respondent had ample opportunity at that time to ask Mr. Lindholm any question which he desired to do. He failed to do so and failed to ask any other witness any question upon that subject matter. Subsequently, when Mr. Lindholm was called as a witness for defendants (Ab. 64-69) he was interrogated upon other subjects upon

direct examination. Counsel for respondent then sought by cross-examination to ask Mr. Lindholm the question (Ab. 73), "You haven't any information now as to how this accident happened?", to which objection was made upon the ground that it was improper cross-examination and which objection was sustained. No appeal is taken from that ruling of the court but counsel would now attempt to take advantage of that to raise a presumption that the defendant Motor Park was concealing something. Not only was it improper cross-examination but the question called for hearsay and speculation upon the part of Mr. Lindholm. It was uncontradicted that Mr. Lindholm was not here when the accident occurred and had not been for some time before, and did not return to Salt Lake City for weeks after the accident.

Counsel for respondent served a demand (Ab. 50-51) that they be allowed to inspect the premises and certain pipes, unions and connections. While the demand to see the apartment was somewhat peculiar in view of the fact that it was destroyed, nevertheless counsel for respondent himself states (Ab. 51) that he was told that the pipes were there and that he was welcome to see them. The pipes were brought into court but no one was called to identify them, and no effort was made at all to present them in evidence or to elicit any information with reference to them.

Respondent called Mr. Slusser of the Public Service Commission to testify. He appeared by counsel (Ab. 52) and claimed the privilege and refused to testify under

the provisions of Section 104-49-3 (5) and Section 76-4-16. In addition both defendants objected to the competency of the evidence. The court refused to compel the witness to testify.

The last provision of the statute requires the Public Service Commission to investigate the cause of all accidents occurring within the State resulting in loss of life or injury to persons or property connected with any public utility, or directly or indirectly arising from the maintenance or operation of utilities. It provides further that neither the order nor recommendation of the Commission, nor any accident report filed with the Commission shall be admitted as evidence in any action for damages based upon or arising out of the loss of life or injury to person or property referred to in the section. The other section of the statute provides that a public officer cannot be examined as to communications made to him in official confidence when the public interests would suffer by the disclosure.

Respondent failed to assign cross-errors in connection with this ruling of the court, and we respectfully submit that under the authorities no presumption arises either way from failure to produce such evidence.

The law required defendant Motor Park to give the Public Service Commissioner a free hand in investigating this accident and required defendant to place at the disposal of the Public Service Commissioner all evidence in its possession, including the pipes, connections, and

appliances within the cottages. Certainly defendant is not to be prejudiced by this requirement of the law. Plaintiff's husband was in Salt Lake City at the time of the accident and according to his own evidence remained here for about five weeks. He had free access to the premises where the accident occurred to make any investigation which he desired, either personally or by representative. He testified (Ab. 28) that he made an examination of the premises. He certainly had all of the opportunity which defendants had to make any examination and investigation that he desired, and for such purpose he could have utilized an engineer had he so desired. In fact he had greater opportunity than the defendant Motor Park because the manager of the Motor Park was absent and did not return for weeks.

There may be some doubt as to whether the privilege of the statute would have extended so as to preclude the witness Slusser or some other witness from the Public Service Commission from identifying the pipes which they took into their possession. For some reason best known to counsel for respondent he preferred to stand upon a supposed unfavorable presumption against defendants by reason of this situation than to make any effort to have the pipes identified or to present competent evidence upon the subject matter.

This case therefore does not fall within the authorities cited by counsel to the effect that if a party to the suit fails to present evidence in its possession not available to the other party, an unfavorable presumption

arises therefrom. The evidence was equally available and equally unavailable to all parties, and Mr. Slusser equally disqualified as a witness to testify for or against either party as to matters and things which he discovered in his investigation, and the evidence was equally privileged as against all parties as to Mr. Slusser's conclusions or opinions.

Respondent cites 36 Corpus Juris, Section 887, page 212, to the effect that where a landlord leases separate portions of the same property to different tenants but reserves under his control certain parts to be used in common by all tenants, that the landlord is under the implied obligation to keep the part over which he reserves control in repair; and that this doctrine likewise applies to that portion to which the tenants have no right of access; and also to agencies, appliances and instrumentalities supplied by the landlord for the use of the several tenants. Counsel also quotes at length a statement by some editor of A. L. R., found in 13 A. L. R. at page 837, to the effect that a landlord is also responsible for the maintenance of a plant or system installed for the benefit of all tenants regardless of where it is located.

The doctrine contended for by respondent is impliedly recognized by this court in the case of *Wilson v. Woodruff*, 65 Utah 118, but this court refused to apply it in that case because plaintiff had failed to establish by competent evidence that the accident occurred by reason of a defect in a part of the building reserved by the landlord. The fact is that such law has no applicability

in the case at bar for the same reason it was not applied in the Woodruff case. Plaintiff failed to establish by any evidence whatsoever the cause of the accident or where the gas came from that exploded. Certainly, as stated by plaintiff on page 11 of her brief, it is beyond question that it was gas which exploded, but that does not establish the fact that the gas came from a pipe beneath the building any more than it established that the gas came from one of the appliances within or beneath the building. There were two floor heaters beneath the building in question, one operated by plaintiff and her husband and one operated by Wheelers. The evidence was uncontradicted that both of these appliances were under the control of the tenants. There were two gas ranges within the building, one of which was under the control of plaintiff and her husband and the other of which was under the control of the Wheelers. Certainly those appliances and the pipes and connections in connection therewith were not under the control of defendant Motor Park but were under the control of the tenants, and the defendant Motor Park was dependent entirely upon those tenants for information as to their condition.

Until, therefore, plaintiff had first established by some competent evidence the cause of the explosion and the source of the gas which caused the explosion, the law contended for has no applicability. That such evidence might have to be more or less circumstantial and perhaps even dependent upon the opinion of an

expert does not do away with the necessity for its production.

Nor are the authorities listed in the three A. L. R. annotations cited by counsel for respondent to the contrary. A reading of those cases shows that in each instance where the landlord has been held liable, the thing which caused the injury was identified and shown by competent evidence to have been under the landlord's control, regardless of its location upon the premises.

In the case of *Grobrecht v. Beckwith,* (New Hamp.) 52 A. L. R. 858, a gas water heater was in a bathroom over which the landlord retained control.

The farthest that any court has ever gone in holding a landlord liable is the case of *Wardman v. Hanlon,* 26 A. L. R. 1249, immediately preceding the notes cited by counsel for respondent. There the landlord had exclusive control over the pipes leading to the bathroom facilities in the apartment house. He had exclusive control over the hot water facilities within the apartment house. The tenant had no control over those facilities. There was not even a dispute upon those facts in that case. The landlord was held liable and the doctrine of res ipsa loquitur was held to apply because of the fact that the landlord had absolute control over those facilities. Certainly the same doctrine would *not* have applied had the hot water heater in question been within the apartment and operated by the tenant. The distinction is plainly evident. In the case at bar, on the other hand, the landlord had nothing to do with the

supply of gas into the premises and no control over it, had nothing to do with the operation of the appliances within and under the cottage, and plaintiff produced no evidence whatsoever as to the source of the gas which caused the explosion.

With these distinguishing features in mind we join with respondent in inviting the court's attention to the cases annotated in those three volumes of A. L. R.

On page 12 of respondent's brief counsel quotes 36 C. J., Section 899, page 217, to the effect that the landlord is liable for his failure to prevent the escape of gas from pipes in such quantities as to be dangerous to a tenant. Counsel fails to call the attention of the court, however, to the fact that this statement is a sub-heading under Section "B" at page 212, under the main heading, "Where portions of property not demised or agencies and appliances are retained in control of the landlord" A reference to the cases cited to support that statement shows that in each instance it was a case where gas escaped from an appliance *under the control of the landlord.* The quotation given by counsel for respondent standing alone would be ridiculous in the extreme unless applied within the limitations of the general rule stated above. A landlord certainly is no guarantor that gas will not escape from pipes where the appliances, facilities and even the pipes are within premises demised to the tenant. The landlord is entirly dependent upon the tenant under those circumstances, and the authorities which we have submitted hold that the landlord cannot be liable under

those conditions. This quotation is an apt illustration of how a quotation of that kind may be misunderstood and misapplied when dissociated from its place in the legal picture, and yet how perfectly correct when coupled with the subject matter to which it is related.

Counsel has gone to great lengths in quoting from the evidence of Mr. Lindholm, William Dawson, Harvey B. Bussell, Rosa Louise Bussell, Clara Tissot and John Swager to show that there were gas odors on occasions in the Motor Park. From this evidence he draws the conclusion that the pipes and connections at the Motor Park were in bad condition and that on two specific occasions during the twenty days immediately before the explosion the Motor Park failed to take action to remedy a condition in the immediate vicinity of the Loos cottage.

As heretofore stated, the defendant Motor Park did not deny that there were gas odors in and about the cottages. It admitted that there were occasions when odors were frequent. There were 113 cottages equipped with gas burners and heating appliances. There were occasions when, from natural wear and tear, a connection would become loose. Also through operation of appliances by tenants pilot lights would become extinguished and there would be an odor of gas. As testified by Mr. Lindholm any place where gas is used there is bound to be an occasional odor. It is very offensive and a little of it goes a long way. However, gas is nothing to be trifled with and the Motor Park always called the gas

company whenever they were notified of a leak of any kind.

William Dawson testified that while he observed the odor of gas in his own apartment that it was fixed and he never complained to the Motor Park management thereafter.

Clara Tissot complained of the odor of gas in her apartment and it was fixed. She made no complaint to the management thereafter.

John Swager observed the odor of gas in his cabin but not outside. He never reported it to the officers of the Motor Park; didn't know whether the odor came from the appliances.

Mr. and Mrs. Bussell observed an odor of gas in the driveway between their cottage and the Wheeler cottage most of the time between the second or third of January and the time of the explosion. She claimed to have reported it to Mr. Sheets on or about the second or third of January, at which time (Ab. 38-39) a boy was sent to look at it and she did not know what the officials of the Motor Park did about it. She also claimed to have reported it again on or about the 17th of January. Mrs. Ivie Graham Adams testified that on this occasion (the Sunday before the explosion) the pilot light in the floor furnace had become extinguished and was emitting an odor of gas. She testified that she lighted the pilot light.

From this evidence counsel seeks to establish that the defendant Motor Park failed to inspect the pipes

and connections, that the pipes and connection were in need of repair, and that the complaints by tenants were not followed by prompt attention on these two specific occasions during twenty days immediately before the explosion.

Mrs. Bussell claimed to have made these complaints to Mr. Sheets. While Mr. Sheets denied these conversations with Mrs. Bussell, and while Mrs. Bussell admitted on cross-examination that she had a financial interest in making these statements when they were first made by her, we must nevertheless for the purpose of this appeal accept them as true. Regardless of whether she made any complaint to Mr. Sheets or not it was established by her own evidence that as to the first incident action was taken by the Motor Park to investigate the situation, and in the second instance the cause of the gas odor was definitely established and shown to have been eliminated. Mr. Sheets testified (Ab. 56) that he was near the Bussell and Wheeler cabins three or four times a day, and Mrs. Adams, the housekeeper, was in and about the Loos and Wheeler cottages on the very day of the accident. There were other employees of the Motor Park at the premises. The cottages in question are about 125 or 150 feet from the office (Ab. 64). Mrs. Bussell and her husband, Mr. and Mrs. Wheeler and Mr. and Mrs. Loos had ample opportunity to make complaint, and if one or even two complaints were not sufficient to again complain, if there was a dangerous condition in or about their premises. Mr. and Mrs. Loos of course testified that there was no odor of gas in or

about their cottage, and the Wheelers were not called to testify at all.

This court will certainly take judicial notice of the fact that gas is a highly inflammable substance. If there was any leak in the pipe or connections beneath any of these cottages prior to the time of the explosion, why did the explosion not occur or some fire happen on or between the second day of January and the 17th day of January, when Mrs. Bussell claims to have observed these odors of gas, and when she says they were particularly strong? This accident occurred during the winter-time. There were two floor furnaces and two ranges in operation in the Loos-Wheeler cottage. If gas was permeating these structures either within or beneath them that gas would have ignited when the leak first occurred. Even an appellate court may disregard evidence shown to be improbable or impossible in the presence of established physical facts.

Certain it is that if there was a gas odor in the garage between the Wheeler and Bussell cottages between the second of January and the 17th of January, that gas did not come from the same source as the gas which caused the explosion. Mrs. Loos testified that there was no odor of gas in her cottage just before the explosion when she went into the bathroom. When she came out there was a strong odor of gas and an immediate explosion. This leads to only one conclusion, namely, that the gas which caused the explosion was emitted in great quantities at the particular moment

from some unidentified source—either a sudden break or a turning on of an appliance. The gas so emitted ignited and exploded immediately because it came in such quantities that it could find no escape and because it came immediately into contact with one or more of the four pilot lights or a lighted appliance in the cottage. Whether the explosion occurred beneath the floor, or whether it was in the cottage and also beneath the floor is not shown.

While the source of the gas which exploded was not established by any evidence, it was definitely shown that the only possible sources of ignition were pilot lights in the appliances or a lighted appliance within the cottages. The gas had to travel to the lights to become ignited, and the first ignition had to be within the cottages themselves. This does not establish any particular source of the gas which caused the explosion.

In connection with this evidence as to the presence of gas odors on previous occasions and at other places within the Park, we respectfully call the court's attention to the case of *Mowers v. Municipal Gas Company of Albany,* 126 N. Y. S. 1033. This was an action against a Gas Company for personal injury. Prior to the explosion plaintiff had smelled a strong odor of gas in his apartment. Shortly thereafter an explosion occurred, wrecking the room and injuring the plaintiff. It was subsequently discovered that there was a break in the gas main in the street and that gas had forced itself along the main and along the service pipe into the

apartment. Plaintiff sought to hold the gas company liable upon the theory that its main in the street was old, deteriorated, and that a break might reasonably be expected, and that in fact the break had existed for many months, the odor of gas being perceptible at various times and more violent on particular occasions. Plaintiff established by evidence that there were various complaints to the gas company of the smell of gas by the occupants of houses in the vicinity. Repairmen were sent and the leak in most cases discovered, and after repairs were made the smells ceased. The evidence of gas odors at various places was even stronger than was attempted to be produced by plaintiff in the case at bar. A judgment for the plaintiff was reversed upon the ground that such evidence did not establish the fact that those various and miscellaneous gas odors came from the source which caused the explosion and that the evidence had failed to establish that the break which did occur and from which the gas actually came was known to defendant a sufficient length of time in advance to have permitted repair. It seems to us that this case is upon all fours with the case at bar.

We also refer to the case of *Hammerschmidt v. Municipal Gas Company,* 99 N. Y. S. 890, upon the same subject matter.

This court has held in numerous cases that the fact that a defendant may have been negligent in other matters or on other occasions does not justify a verdict. The specific negligence alleged must be proved.

Nor would such evidence tend to establish a general condition of disrepair or deterioration in the condition of the pipes. The most that can be said for such evidence is that it had a bearing upon an issue which was alleged and presented as against the defendant gas company only. It was alleged in the complaint that the defendants continued to furnish gas after a condition of disrepair or deterioration was known or should have been known. That allegation in turn has to be read in connection with the further allegations of the complaint that the gas company was furnishing the gas. Nowhere is it alleged in the complaint that the Motor Park was furnishing the gas, but on the other hand it is expressly alleged that the gas was furnished by the gas company. Such evidence could not therefore, in the presence of those allegations, be the basis of liability on the part of the Motor Park which was furnishing no gas and which was not even alleged to be furnishing gas.

If such allegation and evidence could be made the basis of a finding of negligence upon the part of the Motor Park, then we respectfully submit that under the uncontradicted evidence the Motor Park did all that it could do under the circumstances, namely, call the gas company again and again and as often as leaks were reported to it. Certainly that was the natural source of assistance for the Motor Park in such cases, and if there was anything wrong the Motor Park was unaware of it.

If appliance leaks from natural wear and tear in an establishment of this kind can be made the basis of

liability against a landlord, then we respectfully submit that the owner of an apartment house, hotel, or other establishment where gas is used becomes a guarantor and can be held liable, regardless of the suddenness or unexpectedness of an event, by merely calling the various tenants to testify that they smelled gas on several occasions. Such is not the law. An ample answer to that contention is found in the authorities which we have cited.

The difference between these wear and tear leaks such as was described by the various witnesses who were called to testify and the major emission of gas such as caused the explosion in question in this case was recognized by the Wisconsin Supreme Court in the case of *Morrison v. Superior Water, Light & Power Company,* 114 N. W. 434, wherein the court denied liability upon the basis of that character of evidence in attempting to establish liability for an explosion, the Wisconsin court stating that in the best of systems such leaks are bound to occur and are not of themselves evidence of negligence.

We respectfully submit, therefore, that there is nothing in the facts of this case, or in the law, to which counsel for respondent has directed attention which in any way affect the applicability of authorities cited by us under this point in our former brief, and we urge on the basis of those authorities and the additional cases cited herein that the trial court erred in refusing to grant the motion for non-suit and directed verdict.

But, says counsel for respondent, even though respondent might have failed to establish the cause of the explosion, nevertheless the doctrine of res ipsa loquitur is applicable and establishes negligence.

II.

DID THE COURT ERR IN REFUSING TO INSTRUCT THE JURY THAT THE DOCTRINE OF RES IPSA LOQUITUR HAD NO APPLICABILITY AS AGAINST DEFENDANT MOTOR PARK?

Respondent seems to have been unable to find any case holding that the doctrine of res ipsa loquitur applies under the uncontradicted facts of this case.

Assuming, as stated by respondent, that the doctrine may apply even though particular acts of negligence be alleged, this does not make the doctrine of res ipsa loquitur applicable in cases where it does not apply.

As is stated in the authorities cited by us, before the doctrine can ever be applied the cause of the explosion (the source of the gas) must be definitely established. In the absence of such evidence how can the doctrine ever be applied?

See *Hubbert v. Aztec Brewing Company,* (Cal.) 80 Pac. (2d) 185 and 1016, wherein the California court refused to apply the doctrine of res ipsa loquitur in a case where the cause of the explosion was unknown and where the source of ignition was under the control of some agency other than the defendant. An excellent discussion of the doctrine of res ipsa loquitur and its ap-

plicability in cases of this kind is set forth in that case, both upon original decision and after granting petition for rehearing.

The case of *Wright v. Southern Counties Gas Company*, 283 Pac. 823, cited by respondent, is not in point, nor is the case of *Van Horn v. Pac. R. & R. Co.*, 148 Pac. 951. In both of these cases the instrumentality causing the injury was shown to have been under the control of defendant and he sought to defend because others *might* have had access to it. That is not our case where two defendants are jointly charged, and the evidence shows the gas to have been under the control of the Gas Company and the appliances under the control of neither defendant. The Wright and Van Horn decisions were both by district courts of appeal of the State of California, not by the Supreme Court of the State of California. Subsequently these decisions were considered and held inapplicable in the Honneman and Gerdes cases from the District Courts of Appeal of California cited by us in our first brief, and the Supreme Court of the State of California, in reversing the Gerdes case upon other grounds, held that the doctrine of res ipsa loquitur had no applicability.

The Supreme Court of the State of Colorado in the case of *Yellow Cab Company v. Hodson*, 14 Pac. (2d) 1081, considered the Wright case but held that the doctrine there announced was inapplicable in a case where two persons are jointly charged with negligence. Ap-

plicability of the doctrine destroys the possibility of two persons being responsible for the injury.

Assuming, without admitting, that the pipes beneath the cottages were under the control of the Motor Park, how can the doctrine of res ipsa loquitur apply in the absence of some evidence that the pipes broke and gave off the gas that exploded?

The mere fact that Instruction No. 5 was requested as an alternate in the event the court refused to give instruction No. 2 has no bearing upon this question. That defendant accepted less than it was entitled to does not stop it from assigning error for failure of the court to give it all that it was entitled to. It certainly needs no citation of authorities upon this subject.

III.

DID THE COURT ERR IN REPEATEDLY ASSUMING AND STATING TO THE JURY IN ITS INSTRUCTIONS THAT THE SYSTEM OF PIPES WITHIN THE MOTOR PARK WAS DEFECTIVE, LEAKING; AND THAT GAS WAS ESCAPING THEREFROM, AND THAT THE GAS WHICH CAUSED THE EXPLOSION AND INJURY TO PLAINTIFF CAME FROM DEFECTIVE OR LEAKING PIPES?

The fact that these instructions were given at the request of the Gas Company instead of plaintiff does not make them any the less erroneous and prejudicial to defendant Motor Park. The trial court's attention was called to this error but it was not corrected. The

fact that counsel for respondent has read the instructions carefully and cannot find any such assumption, or any language from which such assumption can be inferred, does not delete these statements and assumptions from the instructions.

Respondent's entire brief is based upon the assumption that the gas pipes beneath the Loos cottage had been leaking, and that the gas which exploded came from that source. He states on page 21 in connection with his argument relating to the doctrine of res ipsa loquitur, "In no other way may the verdict, under the instructions given, be explained", referring to this very assumption. This statement amply demonstrates the magnitude of that particular issue in the case. If that was the paramount and major issue, then it certainly was erroneous and prejudicial for the court to have assumed those facts repeatedly in instructing the jury.

Not only did counsel for respondent base his entire case at the trial upon that assumption, but he has repeated the error in his brief on appeal, and the trial court grievously erred, to the prejudice of defendant, in making the same assumptions in its instructions.

IV.

DID THE COURT ERR IN HOLDING THE MOTOR PARK TO THE SAME DEGREE OF RESPONSIBILITY AS THE GAS COMPANY AS A SUPPLIER OF GAS?

Respondent makes the following statement in discussing this point:

> "The Motor Park may have been a consumer, as between it and the Gas Company, and entitled to care commensurate with the inherent dangerous character of gas, but as to the plaintiff it is to be charged with the same degree of care."

That is exactly where counsel for respondent is in error. Two parties may be jointly chargeable with negligence. One may be held to a high degree of care as a dealer or handler of a dangerous commodity. The other may be chargeable with negligence in failing to use ordinary care, or for technical violation of an ordinance or statute. It is the duty of the trial court in its instructions to the jury to state the degree of care required of each separately. In the case at bar the trial court erroneously threw the Motor Park (a customer or consumer) into the category of a public utility or dealer in gas.

The Motor Park was no more a dealer or handler of a dangerous agency than the Wheelers, Loos, Bussells or any other customer. A landlord equips the premises for the supplying of gas by the gas company to its tenants, but the gas company sells the gas and the tenant operates it. A landlord may be chargeable for failure to correct a structural defect if it has an opportunity so to do, but this does not warrant an instruction making the landlord a seller or dealer.

It was the duty of the trial court to segregate its instructions as to the two defendants because the defendant Motor Park did not as a customer or consumer

occupy the same position as the Gas Company, whose business it was to handle and deal with the agency which, under the uncontradicted evidence, caused the explosion. As was said in the case of *Sawyer v. Southern California Gas Company,* 274 Pac. 544:

> "Gas companies as manufacturers and distributors of a highly explosive and inflammable substance, possess technical knowledge of the dangers to be guarded against in handling or installing gas appliances for illuminating and commercial purposes *far beyond the knowledge possessed by the average person.*"

As to the remaining assignments of error defendant Motor Park submits them upon the brief heretofore presented.

Respectfully submitted,

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